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A NEW CONSTITUTIONALISM FOR LIBERALS?

MARK TUSHNET*

It has been apparent for at least a decade that liberal constitutional theory is in deep trouble. Of course there are many versions of liberal constitutional theory, but they have essentially no connection to existing practices of constitutional law, considering as practices of constitutional law all the activities of our institutions of government that implicate—interpret, advance, deal with, whatever—fundamental principle. Instead, liberal constitutional theory's vision of the future is nostalgia for the past. For liberal constitutional theorists the Warren Court, or Justice Brennan,[1] basically got everything right, at least in their approach to identifying constitutional law. True, they may have faltered sometimes in implementing constitutional principles, but all that needs to be done today (or tomorrow, or after the next presidential election, or . . .) is to appoint justices in the mold of Warren, Brennan, or Thurgood Marshall. And here I really do mean *all* that needs to be done: No rethinking of what constitutional law is all about seems needed to liberal constitutional theorists.

The contrast with conservative constitutional theory is dramatic. Over the period that liberal constitutional theory basically stopped, conservative constitutional theory flourished. Conservatives articulated a vibrant discourse of originalism, even as they ignored originalism when doing so suited their more fundamental constitutional aims. They provided an intellectual foundation for programs of privatization and the transformation of the modern regulatory state, even as their allies in politics were forced to compromise by accepting much environmental and other regulation. Most important, though, conservative constitutional theory offered a vision of a place toward which constitutional law might move, while liberal constitutional theory looked backward and only grudgingly accepted that Earl Warren and William Brennan were dead.

In this setting, the idea of an experimentalist constitutionalism developed in the article[2] by Liebman and Sabel, and elsewhere,[3] would seem to offer an extremely promising course for liberal constitutional theory. As the article shows, experimentalist constitutionalism responds to the fundamental values to which liberals are committed and to the actual circumstances of social policy in the present time. Experimentalist constitutionalism has precisely the forward-looking vision that liberal constitutional theory needs, and its proponents have

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1. Or Ronald Dworkin.

2. James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003).

3. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

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deployed their approach across a large enough range of issues to make it clear that experimentalist constitutionalism really is a candidate for consideration as a general theory of constitutional law.

Yet, I find it striking that experimentalist constitutionalism has achieved almost no purchase in discussions by liberal constitutionalists. I may be wrong at the margin, but it seems to me clear that experimentalist constitutionalism is something that has not yet reached much beyond the confines of Columbia University. This comment suggests some reasons for the limited reach (so far) of experimentalist constitutionalism. Those reasons in turn suggest some things that might be done to give experimentalist constitutionalism more purchase.

For me, the primary difficulty with experimentalist constitutionalism as it has been developed so far is signaled by the recurrent use of the term *emergent* in descriptions of experimentalist constitutionalism. That term evokes in me an image of something burbling up from below, about to emerge above the surface.[4] But, on examination, that is not quite what Liebman and Sabel describe. Rather, they abstract from the case studies they provide and extract from them some general characteristics of a process that in fact does not exist in either venue. In their work there is, I think, a romantic tendency to "see a world in a grain of sand and heaven in a wild flower."[5]

The article begins by describing an interactive *process* in which higher-level authorities give lower-level ones autonomy, and the lower-level ones give the higher ones information that can then be used in a process of continuous monitoring and improvement through bench-marking and emulation of best practices. And yet, the case studies are curiously static rather than dynamic. True, they show how school systems reached the point of trying something new; they are historical in that sense. But they do not show one level actually interacting with another, or the process of bench-marking, emulation of best practices, and the like. The most that can be said is that the case studies show that institutions are now in place that make that sort of interaction more possible than it had been in the past, and that some participants—though not all—conceptualize their actions in a manner compatible with the model Liebman and Sabel provide. And even those claims have to be limited, for what the case studies really show, I think, that in one system one set of practices has been developed and in the other another. So, for example, Liebman and Sabel write that their studies show how "problems that look intractable in one setting are overcome in another."[6] The experimentalist constitutionalism Liebman and Sabel describe requires that we "commingle" two approaches in order to derive

4. The on-line dictionary I consult offers (among others) these definitions: "rising out of or as if out of a fluid; arising as a natural or logical consequence; newly formed or prominent." Merriam-Webster Online Dictionary, *at* http://www.m-w.com/cgi-bin/dictionary (last visited Nov. 10, 2003).

5. William Blake, *Auguries of Innocence in* SELECTED POETRY AND PROSE OF BLAKE 90 (Northrope Frye ed., The Modern Library 1953) (1863).

6. Liebman & Sabel, *supra* note 2, at 231.

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or develop "a reform model."[7] But, on the evidence they present, we do not know whether that model actually operates in the idealized—or, as they put it, "stylized" and therefore ("slight[ly]") exaggerated[8]—way their model describes.[9]

There is nothing wrong in principle with the sort of over-claiming that seems to me to characterize Liebman and Sabel's article. In particular, where a program that seems unlikely to go away has acquired a bad reputation among one's potential political allies, it may make sense to reconstruct the program in more attractive terms. So, for example, one common account of the No Child Left Behind legislation describes it as a Trojan horse for an assault on public education, imposing impossible-to-meet standards on public schools that will then be declared "failing," in turn inducing parents to withdraw their children from those schools and making public funds available to private schools.[10] Liebman and Sabel show that the legislation has the potential to enhance public education if it is applied in an experimentalist way.

In doing so, Liebman and Sabel point the way to a new political coalition in which liberals, if they succeed, can leach the legislation of any real threat to public education as such, even as they mount "an assault on the established interests"[11]—that is, the interests currently controlling public education. Their emphasis throughout the article on the assembly of coalitions of support for innovative education reform shows that experimentalist constitutionalism may require an appropriate array of *political* support. One difficulty with the political accounts offered in this article, though, is that they are, in a sense, too diverse. The coalition supporting reform in Texas was quite different from that

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7. *Id.* at 300. The article says that commingling the two approaches "produced a reform model," which is true in the sense that it produced that model in the authors' work, but not in the sense that it produced a reform model actually operating in the world.

8. *Id.* at 267.

9. Throughout the article, Liebman and Sabel note in passing that the systems they have examined really are not operating according to their experimentalist model: The present situation is "fluctuating," *id.* at 264; "It is too soon for a comprehensive evaluation of the student outcomes," *id.* at 247; "Presumably, there will be competition . . . . Similarly, it is likely that there will emerge . . . ." *Id.* at 295.

10. Liebman & Sabel, *supra* note 2, at 287. Liebman and Sabel's express response to this concern is, as usual, overstated: They say that "punitive use of the accountability system" will cause "enormous and probably self-limiting political disruption" because "the first obligation" in response to failing schools is "to provide more local choice among schools. Districts with poorly performing schools thus may be forced in effect to bus poor and minority students to presumably richer and whiter schools *within the district.*" *Id.* at 288 (emphasis added). And that, they say, would cause "incalculably great" pressures if it occurred widely. *Id.* The problem, though, is that Liebman and Sabel overlook the implications of the final qualification, that the response is a within-district response. But, for most of the most troubled urban schools, within-district responses will not cause much disruption because, frankly, there are not that many "richer and whiter schools within the district." The political disruptions they refer to involve concerns by *suburban* parents and voters, who are not affected by the within-district responses. *See, e.g.*, James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002) (cited in Liebman & Sabel, *supra* note 2, at n.463).

11. Liebman & Sabel, *supra* note 2, at 268.

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supporting reform in Kentucky: The former "was largely top-down and inside-out," while the latter was "more nearly the reverse."[12] Of course, this may be characteristic of emergent processes generally: The conditions for their emergence are unclear at the outset, and they pop up in seemingly unconnected ways in diverse political settings.

Still, the role that political support plays in generating experimentalist solutions points in the direction of an answer to the question of why experimentalist constitutionalism has not yet gained the traction among liberal constitutionalists that it ought to have. Particular experimentalist programs get traction because of their location in particular political circumstances. Experimentalist constitutionalism will get traction when an appropriate political coalition sees how its members' interests will be advanced by the widespread acceptance of experimentalist constitutionalism as an approach to constitutional law. In pulling together all the particular programs, the coalition would show how the general approach serves the coalition's members.

Here we can return to the successes of conservative constitutional theories. These theories were quite removed from the realities of existing practices of constitutional law when they were initially articulated. But, they were connected to, and nurtured by, groups that had political interests in their success. Business groups, for example, had an interest in ensuring that innovative theories about regulatory takings would be taken seriously, and supported those theories through grants to sympathetic foundations and financial support of conservative litigation centers that pushed the envelope of takings theory. Similarly, conservative originalism served Republican partisan interests in challenging the Warren Court's innovations.

As I see it, then, the question for experimentalist constitutionalism is to identify and connect with political forces that have an interest in experimentalist constitutionalism (rather than simply in particular experimentalist programs). The emphasis in experimentalist constitutionalism on the local origins of solutions to pervasive problems will make this move especially difficult. What may be needed is some sort of coordinating group, akin perhaps to the Federalist Society, that can bring together the scattered examples of experimentalist constitutionalism and encourage liberals to think of them not as interesting but isolated programs, but rather as exemplars of a broader way of thinking about liberal constitutional approaches to the realities of public policy at present.

Whether such a coordinating group exists, or can be created, and whether, if created, it will take experimentalist constitutionalism seriously, are of course open questions. The lesson of the success of conservative constitutionalism is, I think, that something like that is required if experimentalist constitutionalism as a general approach is to take hold outside the Upper West Side.

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12. *Id.* at 250.

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